BRIEF

In Support of Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT.

I.

The opinion of the court below is directly in conflict with this Court's opinion in Chesapeake & O. R. Co. v. Mihas, 280 U. S. 102, 106, 74 L. Ed. 207, 211, which holds that a plaintiff may not recover damages under the Federal Employers' Liability Act, unless he proves that the defendant breached a duty he owed to plaintiff; that although the violation of a duty may be negligence, it is not actionable unless the duty was owed to plaintiff.

Respondent grounds his case upon petitioner's alleged breach of a lawful duty in shunting the cars at excessive speed. "Excessive" used with relation to speed means "to exceed the authorized speed." Funk & Wagnalls' New International Dictionary.

There is no claim that the law or any rule of petitioner "authorized" any fixed rate of speed. Therefore, if there was any "authorized" speed it must have been fixed by custom which created a duty on petitioner to move cars at no higher speed. A violation of this custom would be a breach of duty, i. e., negligence. Consequently, there can be no breach of duty relating to speed except by violation of a custom; because absent a custom, "employees working in railroads yards must look out for moving cars, rather than themselves be looked out for by switching crews.

Connelley v. P. R. Co., 201 F. 54, 56;
Reading Co. v. Haldeman, 20 F. 2d 53, 55;
Cain v. Fort Worth & Denver City R. Co., 75 F. 2d 103, 106;
Sumney v. Southern R. Co., 89 F. 2d 437, 439.

The court below held that respondent "could make a submissible case by showing that the speed at which the cars were shunted in this instance was so grossly excessive as to constitute negligence, without proving the custom."

This cannot be correct, because there cannot be excessive speed without proof of a custom fixing an "authorized" speed, and ipso facto creating a duty on petitioner not to exceed it.

II.

Before custom may supersede law, it must be proved to have been definite, uniform, universal and known.

McClellan v. P. R. Co., 62 F. 2d 61, 63;
C. M. & St. P. R. Co. v. Lindeman, 143 F. 946, 949.

(a) There is no such proof in this record (R. 18, 25, 26, 27, 33, 49, 53, 57, 61, 65, 142, 154). While two witnesses testified that the "usual, customary" speed at which cars were shunted was three and a half to five miles an hour (R. 18, 142), three witnesses said there was no customary speed (R. 49, 57, 61, 65, 154). This evidence is not sufficient to establish such a custom as will supersede positive rules of law; but shows no more than a loose and variable practice.

Sickelco v. U. P. R. Co., 111 F. 2d 746;
In re Bowling Green Milling Co., 132 F. 2d 279.

III.

But even though it were conceded that the custom had been proved, the uncontradicted evidence shows that the alleged customary or usual speed was fixed solely with relation to potential damage to cars, their contents and tracks; and not with relation to possible injuries to employees, who are expected to protect themselves (R. 26, 27, 143, 146, 154).

Therefore, petitioner owed respondent no duty to limit the speed of shunted cars. Consequently, shunting them

at greater speed violated no duty owed to respondent. This Court holds there can be no actionable negligence which is not based upon the violation of a duty owed to plaintiff.

C. & O. R. Co. v. Mihas, 280 U. S. 102, 106, 74 L. Ed. 207, 211.

The opinion of the court below is in direct conflict with the Mihas Case.

IV.

(a) The sole proximate cause of his injury was respondent's own gross negligence in stepping on the track only ten or twelve feet away (R. 99) from the car which struck him. He could have seen the shunted cars coming had he but stepped but a few feet to the west. This he confessedly did not do, but looked from a point and at a time when the Burlington car completely blocked his view of the shunted cars (R. 99), and started across the track, admittedly without ascertaining whether or not cars were moving over the track (R. 99, 100).

Brady v. Sou. R. Co., 320 U. S. 476, 88 L. Ed. 239;
Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 283, 73 L. Ed. 957;
Frese v. C. B. & Q. R. Co., 263 U. S. 1, 68 L. Ed. 131, 132.

(b) There is no evidence that respondent would not have been struck by the Burlington car even though it had been struck by shunted cars moving at three and a half to five miles an hour.

The burden was on respondent to prove that the proximate cause of his injury was the shunting at excessive speed; that he would not have been injured if they had moved at "authorized" speed. Without such proof there is no evidence that petitioner could have reasonably foreseen the injury.

Brady v. Sou. R. Co., 320 U. S. 476, 88 L. Ed. 239.

ARGUMENT.

I.

This action is based upon the Federal Employers' Liability Act which requires proof by respondent of proximal causal negligence on the part of petitioner. "Liability arises from negligence, not from injury, under this Act. And that negligence must be the cause of the injury." Brady v. Sou. R. Co., 320 U. S. 476, 484, 88 L. Ed. 239, 245.

There can be no negligence without a breach of a lawful duty. Consequently, respondent was under the necessity of proving petitioner had violated a duty imposed upon it by law or custom having the force of law. Implicit in his theory of excessive speed is the predicate that there was a normal or authorized speed, and that petitioner was lawfully bound to adhere to such authorized speed. A lawful duty is created by law or by something equivalent. So, there must have been a speed authorized by law or by something equally compulsive.

It is not claimed that there is any law fixing the speed at which cars may be shunted in a switch yard. In fact, the law is just to the contrary of respondent's theory. "Ordinarily employees working in railroad yards must look out for moving cars rather than themselves be looked out for by switching crews." Cain v. Fort Worth & Denver City R. Co., 75 F. 2d, l. c. 106, and cases cited. "Indeed it follows from the nature of such employment that the duty of self-preservation has to rest on them, for no adequate protection, other than self-protection, can be afforded them. And such has been the reasonable holding of the law." Connelley v. P. R. Co., 201 F., l. c. 56; Reading Co. v. Haldeman, 20 F. 2d, l. c. 55.

There is no claim or evidence that any particular speed was authorized by a rule of petitioner. So, neither the law nor petitioner's rules fixed a normal or authorized speed.

If there was any authorized speed, it must, therefore, have been fixed by custom.

The court below erroneously held that there could be excessive speed "without proving custom." This cannot be correct, because speed becomes excessive only because it is greater than is authorized, and in this case there is nothing except custom to fix the authorized speed.

II.

Before custom may supersede law, it must be shown to have been definite, uniform, universal and known; and the burden of so proving rests upon plaintiff. Because such a custom supersedes the law, the custom must be certain in order to provide just measurements; uniform, to furnish a rule applicable to all persons; and known or notorious, to condemn a violator. C. M. & St. P. R. Co. v. Lindeman, 143 F., l. c. 949, 950.

(a) There is no proof of such a custom. One of respondent's witnesses, Brown, testified that the usual, "customary" speed was possibly from three and a half to five miles an hour (R. 18). One of petitioner's witnesses, Siebert, when asked if three and a half to five miles an hour was the "usual and customary" speed, answered: "That's about right, yes" (R. 142). Three of respondent's witnesses, Butler (R. 55, 56, 57), Tunze (61), and Burke (65), testified there was no usual or customary speed. Note: Butler (R. 55) said they "should be kicked in about the speed you could walk—three to five miles an hour, or something like that"; but he testified (R. 56, 57) that the speed at which cars were shunted depended on how far it was desired they should go.

This character of evidence is not sufficient to establish such a definite, certain, uniform custom as will supersede a positive rule of law and transfer from plaintiff to defendant the duty of looking out for plaintiff's safety.

This evidence does no more at best than show a loose and variable practice, binding upon no one and controlled by the vagaries of the individual workman. Sickelco v. U. P. R. Co., 111 F. 2d 746; In re Bowling Green Milling Co., 132 F. 2d 279.

III.

Assuming, however, the sufficiency of the evidence to establish a governing custom fixing an authorized speed, the undisputed evidence by both petitioner's and respondent's witnesses, is that the rate of speed fixed by the custom was based solely upon possible damage to cars, their contents and the track; and was not based upon possible injury to workmen whose duty it was to look out for themselves (R. 26, 27, 143, 146, 154).

The necessary and in fact the inevitable result is that petitioner owed respondent no duty to limit the speed of shunted cars by reason of this alleged custom which was not at all related to his safety. Obviously, shunting them at greater speed was not a violation of any duty to respondent.

This Court in Chesapeake & O. R. Co. v. Mihas, 280 U. S. 102, 106, 74 L. Ed. 207, 211, said:

> "If there was a violation of duty, therefore, on the part of the railway company, it was not of a duty owing to Mihas; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to the complainant."

The opinion of the court below does not follow the Mihas Case.

IV.

(a) The sole proximate cause of respondent's injury was his own gross negligence in stepping on track 18 only ten or twelve feet from the Burlington car which struck him (R. 99). At that time and place he could not see south far enough to see whether or not cars were moving on that track (R. 99, 100); but by stepping a few feet west to avoid the blocking of his vision by that car, he could have seen the shunted cars coming. His duty so to do is admitted by him (R. 96). Knowing that any of the switch tracks might be used at any time, as he says they were in constant use (R. 96), he carelessly failed to take the slightest care for his own safety, and solely and proximately produced his injury. Atlantic Coast Line R. Co. v. Driggers, 320 U. S. 476, 88 L. Ed. 329.

In Frese v. C. B. & Q. R. Co., 263 U. S. 1, 68 L. Ed. 131, 132, recovery was sought for the death of an engineer in a collision with another train at the crossing of two railroads. It was the statutory duty of decedent to ascertain if his train could safely proceed. Plaintiff tried to avoid the consequences of her decedent's violation of duty by saying the fireman was partially to blame for the collision.

Mr. Justice Holmes, refusing to agree to this, said:

> "Whatever may have been the practice, he (the decedent) could not escape this duty, and it would be a perversion of the Employers' Liability Act * * * to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

(b) As respondent submitted his case solely upon the theory that he was injured by "excessive" speed, the burden was upon him to prove that it was "excessive" speed which caused his injury. He could do this only by proving

that had the speed been not excessive, he would not have been hurt. He made no effort whatever to make such proof. In other words, the burden was upon him to prove that had the shunted cars moved no faster than three and one-half to five miles an hour, he would not have been hurt. There is not the slightest evidence to support such an hypothesis.

Moreover, without such evidence there is no proof that petitioner could reasonably have foreseen personal injury as the result of shunting cars at greater speed. Respondent's injury obviously was not "the natural and probable consequence of" the alleged wrongful act, and it should not "have been foreseen in the light of attendant circumstances." It was an event "too remote to require reasonable prevision" of it. Therefore, if excessive speed be admitted, it was not the proximate cause, in whole or in part, of respondent's injury.

Brady v. Sou. R. Co., 320 U. S. 476, 483, 88 L. Ed. 239, 245.

For these reasons, respondent failed to make a submissible case.

Respectfully submitted,

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